

Legal Tech

ELECTRONIC DISCOVERY AND EVIDENCE

By David Narkiewicz

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It is estimated that approximately 93% of all corporate and law firm information is electronic. In 2001, North American businesses sent and received an estimated 2.5 trillion e-mail messages. That number has surely gone up in 2002 and 2003.

What all of this means is that traditional paper-based records retention by businesses and paper-based discovery in litigation is rapidly yielding to businesses maintaining electronic records (a/k/a evidence) and the necessity for electronic discovery.

As many of you will recall, my column in the November-December 2001 issue of this magazine was a review of a book "The Digital Practice Of Law, 5th Edition" by Michael R. Arkfeld. In my article I stated that this book was "by far the best legal technology resource available on the market for lawyers... written for the average legal practitioner". Now Mr. Arkfeld has published another book "Electronic Discovery and Evidence" which is equally superb. "Electronic Discovery and Evidence" provides trial lawyers and business lawyers the essentials they need to know about electronic records, where they reside and what is needed to discover them.

The book has eight chapters with many subchapters, all laid out in a very logical and easy to find manner. The best part about the book is that it is written as a reference book, so that you can jump around using it. It is not a novel you need to read cover to cover. Instead, you go to the sections you are most interested in learning information about and then go back to it as you need to. All readers will enjoy the 13-page Glossary in the back of the book that in simple English explains various technology terms and acronyms. The book also has a nice Word Index in the back that works well with the very detailed Table of Contents at the beginning of the book. I must admit that finding the information you need in this book using the Table of Contents or Word Index is much easier than even using the Google search engine on the Internet.

Chapter 1 – Electronic Information in Litigation

This chapter discusses the transition from paper information to electronic information over the last few decades to the point where it is now estimated that more than 30% of corporate communications never even appear in printed form and how virtually all corporate information

will soon be in electronic form. This chapter explains the myth about “deleting” computer files. It explains that when a user thinks they have “deleted” a file, it does not cause the data to be destroyed, but rather using “delete” simply changes the way the computer reads that particular data and it remains on the hard drive until it is overwritten by new data. This chapter also discusses “metadata” – the hidden computer data which is contained in the electronic file of a word processing document, e-mail or spread sheet that contains information concerning prior versions, the authors of the documents, the date of revisions, the date the document was last accessed and other relevant information. Electronic discovery, if done right, can sometimes find golden nuggets of valuable information that someone thought was “deleted”.

Chapter 2 – Creation and Storage of Electronic Information

This chapter explains how electronic information is created, stored and retrieved. It explains how the various types of storage media work, such as floppy disks, hard drives, CD-ROMS and other devices. It also covers discovery from storage devices such as servers, mainframe computers, personal computers, laptops and PDA’s. Lastly, it covers storage locations, such as backup systems, Internet service providers, application service providers and other providers where valuable data may reside.

Chapter 3 – Structure and Type of Electronic Information

This chapter goes into detail on how information is organized on computer systems. Interestingly, “organized” is actually a misnomer when it comes to electronic data because in reality the data is not kept in neat little electronic files that occur one after another on a hard drive, such as might be the case in a well-organized filing cabinet. Rather, electronic information on computers can often be found in many different directories and on many different computers at a business. Older data may only be available on archived hard drives or backup media such as magnetic tapes or other storage devices. This chapter also provides useful information about the various types of data, such as electronic messaging (e-mail), text documents (word processing), various types of Internet data, databases, and spreadsheets. Each of these types of data use different ways to store information and so a basic understanding of the differences is needed in order to understand how to conduct electronic discovery of each type of data.

Chapter 4 – Computer Forensics, Experts and Service Bureaus

This is a very valuable chapter that stresses the need to use computer forensics specialists in helping to conduct electronic discovery and the methodology that is required to obtain electronic information and discovery. One thing you will certainly learn from this chapter is that you cannot conduct extensive electronic discovery by yourself. You will need an expert because the handling or mishandling of electronic information is critical. Often the person that you use may end up having to testify in court as to the methodology used to extract information, so that is another reason why you cannot do this yourself.

Chapter 5 – Collecting, Processing and Searching Electronic Information

This chapter discusses what to do with the electronic data once you have received it. It explains the collection procedure, the extraction and conversion of data and the searching of the electronic information. Unless you have a degree in information technology, this is a “must read” chapter because you most certainly did not learn this in law school or from your last CLE.

Chapter 6 – Discovery and Production Process & Chapter 7 – Court Procedural Rules and Case Law

If you are a Pennsylvania civil trial lawyer, you should understand the Pennsylvania and/or Federal discovery and production process; however, I will not assume that you understand how that process applies to electronic discovery. Mr. Arkfeld has written this book as a national textbook, so although it is not limited to Pennsylvania procedure or case law, it has numerous Federal and state citations that will be quite valuable for use in Pennsylvania state and Federal courts. There are few appellate court opinions from Pennsylvania dealing with these issues, so if a Federal case or a case from another state applies to your Pennsylvania case, then by all means cite it. (Of course, conduct your usual Pennsylvania research to see if there is a case on point for you.)

Chapter 8 – Admissibility of Electronic Evidence

This chapter lays out very nicely the requirements for admissibility of electronic evidence, with a particular emphasis on the Federal Rules of Evidence. Since Pennsylvania’s Rules of Evidence are derived in large part from the Federal Rules, this is a very valuable chapter for Pennsylvania practitioners.

Summary

Mr. Arkfeld is a practicing civil trial lawyer with almost 30 years of experience in litigation. He has written this book so that it contains information lawyers need concerning electronic discovery and evidence, but in a way that is understandable. His website is found at www.arkfeld.com. This book can be ordered directly from the website or by placing an order by telephone at (602) 993-1937. The cost of the book is \$149.99. Included in the purchase price is access to a members only section at www.arkfeld.com that contains valuable updates and forms for use with your electronic discovery. If you are a civil trial lawyer or a transactional attorney who advises business owners, then you really need to have this book available in your law library. Read it, because you absolutely need to know this subject matter. It is too late if you wait for your client to ask you about electronic discovery and evidence. If you do not know what they are talking about when the issue comes up, they may very well go elsewhere.